SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HILARY B. MILLER,

Petitioner,

- against -

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES and BENJAMIN M. LAWSKY, in his official capacity as Superintendent of the New York State Department of Financial Services,

Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Index No. 101118/14

Assigned to Hon. Joan Lobis

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF THE PETITION AND IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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INTRODUCTORY STATEMENT

Hilary B. Miller respectfully submits this memorandum of law in support of his Article 78 petition, pursuant to New York's Freedom of Information Law ("FOIL"), Pub. Off. Law §§ 84-90, and in opposition to respondents' motion to dismiss the petition.

The petition seeks principally to compel respondents to disclose their "database" of disfavored payday lenders with whom banks are requested by respondents not to deal—a *de*

facto blacklist— and likewise to reveal the basis on which lenders are selected for inclusion in the database.

The parties agree that the purpose of the database is to choke off payday lending to consumers by causing banks to engage in a concerted refusal to deal with the blacklisted lenders. According to their cross-motion papers, respondents have *contracted* with Bank of America, Citibank, JPMorgan Chase Bank, M&T Bank and Valley National Bank—five of the largest banks in America, all with multistate operations—to conduct what amounts to a group boycott. Therefore, as respondents intend, a lender who is blacklisted will experience considerable difficulty in opening or maintaining banking relationships anywhere in the United States.

Lenders who are blacklisted will generally know that they are blacklisted because respondents have already sent them cease-and-desist letters. But no one—other than respondents—knows how lenders are selected for inclusion in the blacklist.

Respondents assert two reasons for denying access to the requested information: first, the records in question are alleged to have been compiled for law enforcement purposes; and second, the records are alleged to be intra-agency administrative materials produced during the deliberative process—and thus, in respondents' logic, exempt from FOIL disclosure.

As discussed more fully below, the "law enforcement" exemption does not apply to the records in question because they do not reveal non-standard investigative techniques and their disclosure is unlikely to interfere with any actual investigation; the very manner in which they were acquired and are used rebuts this assertion. Moreover, disclosure of the

techniques, if any, involved in the database will not empower wrongdoers to conceal their wrongdoing.

Respondents did not raise the intra-agency or "deliberative process" exemption in response in administrative proceedings below; and they now, belatedly, have decided that it should apply to the records in question. However, the kind of "deliberation" that went into preparation of the database is the same kind of generic internal agency cooperation that goes into the creation of the vast majority of agency records; statistical or information tabulations are *always* disclosable, regardless of how they were compiled. Respondents fail to show how the disclosure of these records will create the kind of harm that the "deliberative" exemption was intended to avoid.

Accordingly, for these and the other reasons hereinafter set forth, the petition should be granted, and respondents' motion to dismiss should be denied.

BACKGROUND

Petitioner commenced this proceeding by filing a verified petition on October 9, 2014. The petition seeks to compel the compliance with FOIL-mandated production of state agency records related to a "database tool"[1] announced by Governor Cuomo on June 16, 2014. Respondents previously refused to produce any of these records:

> 1. The database itself (i.e., the list of illegal lenders and/or other data promulgated by DFS that may be queried using the tool).
>
> 2. A working copy of the tool.

[1]A "database" a merely collection of information. See, http://searchsqlserver.techtarget.com/-definition/database (last visited December 8, 2014). As such, a database is definitially a compilation of factual data. A database is *not* an algorithm, secret formula or artificial intelligence engine.

> 3. Documents relating or referring to how lenders were selected for inclusion in the database, including all correspondence and memoranda describing the criteria for inclusion of lenders in the database.
>
> 4. All forms, manuals, documentation, flowcharts, source code and other documents relating to the tool.
>
> 5. All policies and procedures relating to the database and/or the tool, including procedures for updating the database.
>
> 6. All agreements entered into to date with banks and with other third parties relating to the database and/or to the tool.
>
> 7. All contracts and orders placed with third parties relating to the development of the tool.
>
> 8. Documents identifying employees of DFS who were responsible for development of the tool and/or compilation of the database.

Petition, Exhibit "C." Respondents below gave, as their reason for refusal to produce these records, solely the "law enforcement" exemption under FOIL.

Respondents have not filed a verified answer, but have instead filed a motion to dismiss the petition; we argue below that respondents' motion goes beyond the "objectons in point of law" permitted under CPLR § 7804(f), fails to raise any actual "points of law," and should be denied on these grounds alone.

In support of their motion, respondents submit the affirmation of Max Dubin ("Dubin Aff."), an attorney for respondents. Mr. Dubin explains respondents' motivation for their enforcement actions against illegal lenders:

> 25. … DFS decided, therefore, that its investigation into illegal payday lending should include a database containing certain critical *information regarding payday lenders and their illegal consumer loan activity*. This database *could assist the Department in its investigation*,[2] and would be a helpful tool to enable banks and other financial institutions in meeting their ongoing due diligence obligations to identify and prevent illegal payday lender transactions and to protect consumers from abusive financial practices.

[2] As noted below, this statement is inconsistent with prior public statements by both Governor Cuomo and respondents regarding the purpose of the database.

> 26. To that end, DFS began compiling information gathered during its ongoing investigation into payday lenders *to help banks and other financial institutions identify lenders who were lending illegally to New York consumers. This includes information that could help financial institutions to identify whether payday lenders in the Database are either the institutions' own customers or are transacting with their consumer accountholders*. The Database is, and will continue to be, populated with new information that DFS gathers in its ongoing investigation.

Dubin Aff., ¶¶25-26 (emphasis added).

This characterization is inconsistent with the Governor's statement about the database, and also inconsistent with Mr. Dubin's other statements in his affirmation. Mr. Dubin affirms:

> On June 16, 2014 Governor Andrew Cuomo announced the creation of the Department's Database which *contains information about payday lending companies that have been subject to DFS actions* based on evidence of illegal online payday lending to New York consumers.

Dubin Aff., ¶23.

Both parties attach the Governor's June 16 press release to their papers. That release states plainly that the database is:

> . . . a new Department of Financial Services (DFS)-created tool *to help banks* identify and stop illegal, online payday lending in New York. DFS built *a database of companies* that have been subject to actions by DFS based on evidence of illegal payday lending.

Petition, Exhibit "B"; Dubin Aff., Exhibit "F."

These two statements make clear two key elements of this case:

- first, the database consists primarily of a *list* of illegal lenders, and possibly other information that the lenders know about themselves; and
- second, the database was compiled primarily as a tool to help *banks*, not to help respondents.

Thus, when respondents argue that the "Database is an informational tool to assist DFS in identifying and ultimately stopping illegal payday lending" (Opposition Brief ["Op.

Br.”] at 12), they completely contradict statements both by the Governor and by respondents themselves regarding the purpose of the database.

Respondents explain in conclusory terms how the disclosure of the information sought by petitioner could harm an actual, ongoing legal investigation. Indeed, they do barely more than merely parrot the statutory language of the exemption. In particular, respondents do not explain:

- In what respect the database consists of information that is not already known to the illegal lenders themselves, or already included in respondents’ press releases, such as their names (and perhaps also the names of their third-party payment processors other or identifying information about them, since the purpose of the database is to *identify* illegal lenders);
- Why it is necessary to keep the list of illegal lenders a secret, since respondents have already gone out of their way to publicize the names of such lenders;
- Why it is necessary to keep the agreements between respondents and participating banks a secret, insofar as respondents have disclosed the names of the assenting banks and the material terms of the agreements (Dubin Aff., ¶27); and
- Why the manner in which lenders are selected for addition to the database needs to be a secret, and, perhaps more importantly, whether such a decision rule amounts to an impermissible “secret regulation.”

Ultimately, this case turns in part on whether the database is analogous to the secret formula for Coke®, or simply to a can of Coke®. Respondents and the Governor, having previously announced that it is the latter, now want this Court to believe that it is the former.

Because of FOIL's presumption in favor of disclosure, respondents have not met their burden of showing that the requested records fall squarely within a statutory exemption. In particular, even if compiled for law-enforcement-related purposes, respondents have failed to show exactly how disclosure of the requested records will interfere with any active law enforcement activity or allow lenders to evade detection. Accordingly, respondents' motion to dismiss should be denied, and the petition should be granted following an *in camera* review of the materials in question.

ARGUMENT

POINT I

RESPONDENTS HAVE NOT SHOWN "PARTICULARLIZED" FACTS SUFFICIENT TO DEMONSTRATE THEIR ENTITLEMENT TO THE LAW-ENFORCEMENT EXEMPTION

The Legislature declares that "government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government." Pub. Off. Law § 84. FOIL was enacted to provide ordinary citizens with the means to access governmental records, to assure accountability and, very importantly in the context of this case, to thwart secrecy. *Matter of Weston v. Sloan,* 84 N.Y.2d 462, 643 N.E.2d 1071, 619 N.Y.S.2d 255 (1994). Thus, all records of a public agency are presumptively deemed to be open to public inspection without regard to need or purpose of the applicant.

Respondents do not dispute that they are in all respects a public agency. Pub. Off. Law § 86(3).

Against this background, respondents correctly cite the leading case regarding the law-enforcement exemption under FOIL, *Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 393N.E.2d 463, 419 N.Y.S.2d 467 (1979). Fink stands for the proposition that FOIL exemptions are narrow, and that this Court should indulge every reasonable presumption in favor of disclosure.

As the Court of Appeals has also held, principally in reliance on its prior holding in *Fink*:

> To ensure maximum access to government records, the "exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption." As this Court has stated, "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [citing *Fink*].
>
> In keeping with these settled principles, blanket exemptions for particular types of documents are inimical to FOIL's policy of open government. Instead, to invoke one of the exemptions of section 87(2), the agency must articulate "particularized and specific justification" for not disclosing requested documents [citing *Fink*]. If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material.

Gould v. New York City Police Dep't, 89 N.Y.2d 267, 675 N.E.2d 808, 653 N.Y.S.2d 54 (1996) (internal citations omitted).

Respondents do not correctly apply the *Fink* and *Gould* logic to the facts of this case. Rather, they simply recite the statutory exemption and then make statements inconsistent with the Governor's and respondents' own prior statements in order to create the false impression that the records sought fall within the exemption.

Fink and its progeny require, for the exemption to apply, more than merely that the requested records have been compiled for a law-enforcement purpose. To the contrary, respondents must articulate a "particularized and specific justification" of *how* release of the records will apprise wrongdoers of the non-routine procedures by which an agency obtains its information. *Fink*, 47 N.Y.2d at 572. "Indicative" of whether investigative techniques are non-routine is whether disclosure would give rise to a "substantial likelihood" that violators could escape notice by tailoring their conduct in anticipation of investigation. *Id*.

And here is where respondents' logic falls apart. Respondents do not give a "particularized and specific" explanation of what is contained in the database or *how* disclosure of that information will enable illegal lenders to avoid detection. Instead, respondents simply posit that such disclosure will be harmful in self-serving, unsupported and conclusory statements. The logic of *Lewis v. Giuliani* (Sup. Court, New York Co., NYLJ, May 1, 1997, available at http://nycrubberroomreporter.blogspot.com/2014/03/freedom-of-information-requests-and.html [last visited December 8, 2014]), precludes a state agency from relying on a FOIL exemption based merely on a reiteration of the statutory language, holding that the agency "may not engage in mantra-like invocation" of the exemption in an effort to withhold information. Accord, *Carnevale v. City of Albany*, 68 A.D.3d 1290, 891 N.Y.S.2d 495 (3d Dep't 2009) (conclusory statements are insufficient to deny access, as are categorical assertions that all law enforcement investigations will be harmed if disclosure is permitted); *Church of Scientology v. State of New York*, 46 N.Y.2d 906, 908, 387 N.E.2d 1216, 414 N.Y.S.2d 900

(1979) (affidavits that merely parrot the statutory language of the exemption are not sufficient).

If, as seems likely, the database consists primarily of existing information *about* lenders—such as their names, nicknames, bank information, electronic banking identifiers, etc.—not a "secret formula" for discerning whether a business is an illegal lender, then evasive conduct by lenders is highly improbable; see, *Matter of Capruso v. New York State Police*, 300 A.D.2d 27, 751 N.Y.S.2d 179 (1st Dep't 2002) (court "not persuaded" that the information could be used to evade detection). Such evasive conduct is entirely inconsistent with respondents' prior public statements to the effect that the database is primarily an enumeration of lenders' names and other identifying information—information already known to the lenders themselves. The facts of this case are similar those of Advisory Opn. of Committee on Public Access to Records, Sep. 4, 2007, FOIL-AO-16776 (Police Department list of "off limits" locations is a disclosable final policy).

Respondents themselves characterize the records as a "database"—i.e., a "collection of information" (see fn. 1, *supra*)—and not as an artificial intelligence device or algorithm. If this characterization is correct, then there cannot be a reasonable basis for withholding the database, and the petition should be granted.

As noted above, courts have consistently held that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to governmental records. *Matter of Buffalo News v. Buffalo Enters. Dev. Corp.*, 84 N.Y.2d 488, 492, 644 N.E.2d 277, 619 N.Y.S.2d 695 (1994). Accordingly, the records in question should be

subjected to an *in camera* inspection for the purpose of determining whether the claimed exemption should apply. In the unlikely event that some portions of the records sought may be exempt from disclosure, this Court should identify any necessary redactions and require production of the remaining portions.

POINT II

A "DATABASE" CANNOT BE EXEMPT DELIBERATIVE MATERIAL

The "intra-agency" exemption (Pub. Off. Law § 87[2][g]) permits an agency to withhold records that constitute deliberative materials or "pre-decisional" records. Respondents now attempt to shoehorn their facts into this exemption, even though they did not assert this exemption below. For the reasons hereinafter set forth, this argument should be rejected.

This intra-agency exemption has its own exception (in effect, a double negative): even if deliberative or "pre-decisional" in nature, records are affirmatively disclosable if they are merely compilations of fact. *Id*. at subd. (i).

As noted previously, a "database" is, by definition, merely a collection of facts (see fn. 1, *supra*). Any such collection of information thus falls squarely within the ambit of "statistical or factual tabulations or data" (*id*.) that are *always* subject to FOIL disclosure, regardless of whether *vel non* they are the product of a deliberative or pre-decisional process. *Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp*., 62 N.Y.2d 75, 83, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984); *Matter of MacRae v. Dolce*, 130 A.D.2d 577, 515 N.Y.S.2d 295 (1st Dep't 1987). This "data" exemption permits access to *factual information* upon which the agency relies for any purpose, even its own internal purposes. *Matter of Miracle Mile As-*

socs. v Yudelson, 68 A.D.2d 176, 181, 417 N.Y.S.2d 142 (4th Dept 1979). Thus, to reiterate, the database, even if it contains intra-agency records, is subject to FOIL disclosure to the extent that the intra-agency records contain statistical or factual tabulations or data. *Matter of Gould v New York City Police Dept*., *supra*, 89 N.Y.2d at 276.[3]

Accordingly, respondents' assertion that the database itself is exempt from disclosure as intra-agency, pre-decisional or deliberative material must be rejected.

POINT III

RESPONDENTS' STANDARDS FOR SELECTION OF LENDERS TO BE INCLUDED IN THE DATABASE, IF UNDISCLOSED, WOULD CONSTITUTE AN IMPERMISSIBLE "SECRET REGULATION"

This proceeding seeks to compel disclosure not only of the database itself —i.e., the catalog of blacklisted businesses—but also of the records that show how businesses are selected for blacklisting. As the petition avers, this is critical information not only for the public at large but also for legitimate lenders, who are entitled to know whether the DFS-organized group boycott have the potential incorrectly to sweep up compliant firms with illegal lenders.

[3]The standard for distinguishing "factual data" from other intra-agency mateirals is set forth in *Gould*: "Factual data . . . simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making." *Gould*, 89 N.Y.2d at 277. To the extent that the "database" contains "statistical or factual tabulation or data" it should be produced through a redacted document if necessary. *Matter of Xerox Corp. v Town of Webster*, 65 N.Y.2d 131, 133, 480 N.E.2d 74, 490 N.Y.S.2d 488 (1985); *Matter of Newsday, Inc. v. New York State Urban Dev. Corp.*, 181 A.D.2d 436, 580 N.Y.S.2d 1015 (1st Dep't 1992) (statistical data contained in an internal audit report prepared by the Urban Development Corporation are disclosable as nonexempt statistical or factual material).

An undisclosed government rule that has the effect of causing the largest banks in America to boycott certain disfavored lenders is tantamount to a "secret law." The term "secret law" is used in open-government proceedings to describe materials the agency uses in the discharge of its regulatory duties and in its dealings with the public, but attempts to keep hidden behind a veil of privilege. *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983); such a "secret law" is indistinguishable in its economic consequences from an outright statutory prohibition.

Recognizing the need for disclosure of internal agency policies that have the practical effect of law, FOIL expressly requires the disclosure of records that constitute "final agency policy or determinations." Pub. Off. Law § 87(2)(g)(iii). "[T]he purpose of the [inter-agency/]intra-agency exemption [is] to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure." *Matter of Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp.*, 54 A.D.3d 154, 166, 861 N.Y.S.2d 51 (1st Dep't 2008), quoting *Matter of New York Times Co. v City of NY Fire Dep't.*, 4 N.Y.3d 477, 488, 829 N.E.2d 266, 796 N.Y.S.2d 302 (2005)—and not to prevent the disclosure of already-implemented policies.

In contrast, this actual policy of respondents has been fully implemented and communicated to third-party banks outside of state government, who are acting on it to the detriment of lenders, some of whom may have been incorrectly classified as illegal operators. Respondents' decision rule for classifying lenders as illegal manifestly constitutes a "policy" that, at

least for purposes of the five large banks to whom the database has been distributed, is utterly "final."

The possibility that a lender may be included in respondents' blacklist by the application of a hitherto secret policy or determination is a matter of great public interest. The exact terms of that policy, whether incorporated in the database "tool" itself or in other agency records, are disclosable under FOIL. Rules and laws inaccessible to the public are inherently and manifestly antithetical to democracy. For these reasons, production of the requested records should be compelled.

POINT IV

RESPONDENTS' MOTION SHOULD BE DENIED ON PURELY PROCEDURAL GROUNDS

Article 78 permits respondents only two pleading options in response to a petition: file an answer, or file objections in point of law. CPLR §§ 7804(e) and (f). Objections in point of law may be raised as a motion to dismiss. *Id*.

But respondents do not allege that the petition is legally insufficient, that this Court lacks jurisdiction of the matter, that petitioner has failed to exhaust his administrative remedies, or any other "point of law" that would entitle them to dismissal of the petition. Rather, on their motion, respondents seek to controvert the factual allegations of the petition and to introduce new facts showing their entitlement to various exemptions under FOIL. These factual matters are out of place on a motion which, by statute, is limited to purely point-of-law

grounds. See, e.g., *Keogh v. New York State Dep't of Health*, 128 A.D.2d 841, 513 N.Y.S.2d 761 (2d Dep't 1987).

Respondents are entitled to raise their factual disputes, but those matters belong in their answer. But because respondents do not now raise any purely legal grounds to challenge the petition, their motion should be denied outright.

CONCLUSION

For all of the reasons hereinabove set forth, respondents' motion should be denied, and respondents should be directed to file their answer as required by CPLR § 7804.

Dated: New York, New York
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